United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7339 75-7351

To be argued by
ROBERT P. HART

United States Court of Appeals

FOR THE SECOND CIRCUIT

MICHAEL CASTELLANO,
Plaintiff-Appellee.

—against—

RUDOLF OETKER,
Defendant and Third Party Plaintiff-Appellee-Appellant,

—against—

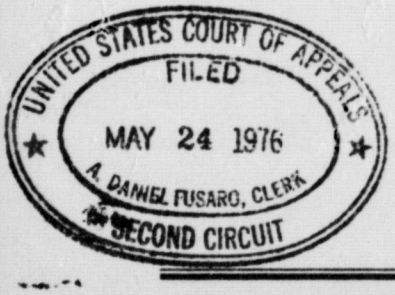
BAY RIDGE OPERATING CO., INC.,
Third Party Defendant-Appellee-Appellant,

—and—

STANDARD FRUIT & STEAMSHIP CO.,
Third Party Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF THIRD PARTY DEFENDANT-APPELLEE-APPELLANT BAY RIDGE OPERATING CO., INC.



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Statement

With the exception of plaintiff who has not appealed, each of the other parties has taken an appeal designating, in accordance with the provisions of Rule 3(c) of the

Federal Rules of Appellate Procedure, the "parts thereof appealed from".

The judgment below followed a jury trial awarding plaintiff Michael Castellano $75,000. against Rudolf A. Oetker (referred to as "Oetker") for injuries sustained on January 15, 1970, while plaintiff was working as a longshoreman aboard the SS POLARSTERN owned and operated by Oetker. Plaintiff had been employed by stevedore Bay Ridge Operating Co., Inc. (referred to as "Bay Ridge") and was injured while loading a cargo of bananas from a conveyor belt owned and supplied by Standard Fruit & Steamship Co. (referred to as "Standard") for use aboard the vessel.

Plaintiff sued Oetker. In turn, Oetker impleaded Bay Ridge and Standard, who cross-claimed against each other. Bay Ridge also counterclaimed against Oetker. These third party claims were decided by the lower court with consent of the parties. The judgment below thus consisted of four parts (1) recovery by plaintiff against Oetker; (2) recovery by Oetker against Standard; (3) recovery by Oetker against Bay Ridge; and (4) dismissal of the cross-claims and counterclaim. (245a-246a)

Plaintiff has not appealed.

Oetker has filed a protective cross-appeal only from the judgment obtained by plaintiff. (252a)

Standard has appealed from that part of the judgment granting recovery to plaintiff, as well as that part of the judgment against it granting recovery to Oetker, but Standard has not appealed from any other part of the judgment, including the dismissal of its cross-claim against Bay Ridge. (248a)

Bay Ridge has appealed from all portions of the judgment. (250a) This is in the nature of a protective cross-appeal, however, because of the attack by Standard on the prime judgment obtained by plaintiff, in which Oetker and Bay Ridge join.

Summary of Argument

Bay Ridge concurs in the arguments made by Standard and Oetker for reversal of that part of the judgment granting recovery to plaintiff, and will not repeat them here.

If plaintiff's judgment is reversed and the complaint dismissed, the judgment over for $37,500. obtained by Oetker against Bay Ridge will fall (just as the judgment over for $37,500. obtained by Oetker against Standard). This is conceded by Oetker at page 4 of its brief. In this respect, to simplfy the issues, Bay Ridge abandons its appeal from the dismissal of the counterclaim against Oetker and will not controvert on this appeal Oetker's demand for counsel fees and costs as awarded below (from which neither Oetker nor Standard appealed).

As to Standard, it seems clear that the dismissal of Standard's cross-claim against Bay Ridge must remain undisturbed. Standard neither has appealed from that part of the judgment nor does it seek reversal of that part of the judgment in its brief on appeal (Point I., p. 4, *infra*). Accordingly, Bay Ridge, to simplify further the issues, will abandon its appeal from the dismissal of its cross-claim against Standard.

If plaintiff's judgment is affirmed, Bay Ridge's over-all liability cannot exceed the $37,500. plus the portion of counsel fees and costs granted to Oetker by the court below. Oetker also did not appeal from that portion of the judg-

ment, and, indeed, at pages 2 and 4 of its brief on appeal Oetker requests affirmance of the $37,500. recovery from Bay Ridge should plaintiff's judgment be affirmed. Therefore, in order to simplify the issues further, Bay Ridge will abandon its appeal from the judgment in Oetker's favor against Bay Ridge and it will not controvert on this appeal Oetker's demand that if plaintiff's judgment is affirmed, Oetker is entitled to recover $37,500. from Bay Ridge plus the share of counsel fees and costs as has been determined by the lower court.

Although Standard maintains its protest that it should have no liability to Oetker in any amount including counsel fees and costs, this issue remains strictly between Standard and Oetker and does not involve Bay Ridge.

Assuming, however, that Oetker or Standard conceivably preserved for appellate review the extent of Bay Ridge's liability despite their failure to take an appropriate appeal, Bay Ridge submits that the determination made by the lower court as to recovery over was correct. (Point II, p. 7 *infra.*)

POINT I.

The appeals by Oetker and by Standard, having been taken specifically only from certain portions of the judgment this Court has no jurisdiction to review the portions not appealed from.

Oetker appealed from "those portions" of the judgment which adjudged that plaintiff recover $75,000. from Oetker. (252a) No appeal was taken from the judgment obtained against Bay Ridge for $37,500.

Standard appealed from certain designated parts of the judgment explicitly identified as a judgment to Oetker

against Standard "in the sum of $37,500.", "and any and all sums allocable to attorney's fees and costs as may be taxed to Third Party Defendant Standard" and it "further appeals from the judgment entered in favor of plaintiff Michael Castellano against third party plaintiff Rudolph A. Oetker in the sum of $75,000." (248a) No appeal was taken from any part of the judgment directed to Bay Ridge nor was any appeal taken from the part of the judgment dismissing Standard's cross-claim against Bay Ridge.

In *Donovan* v. *Esso Shipping Co.*, 259 F.2d 65 (3rd Cir. 1958), cert. den. 259 U.S. 907, the court held that an appeal taken specifically from one part of a judgment deprives the Appellate Court of jurisdiction to review other portions, saying at p. 68:

> "While mere technical omissions in the notice of appeal should not deprive appellant of his right of review, where the appeal is taken specifically only from one part of the judgment the Appellate Court has no jurisdiction to review the portions not appealed from."

In *Terkildsen* v. *Waters*, 481 F.2d 201 (2d Cir. 1973), this court, quoting 9 Moore's Federal Practice §203.18, at 756, stated (481 F.2d at p. 206):

> "On the other hand,
>
> > 'if the parts [of the judgment] are truly independent, the more likely inference from the designation of particular parts in the notice of appeal is that appellant does not desire review of parts not designated'."

In *Terkildsen, supra*, this court held that:

> ". . . plaintiff's notice of appeal, designating only defendants' recovery on the counterclaim as the part

> of the judgment appealed from, clearly falls within the second category, and manifests an intent to leave the judgment on her own claim undisturbed. It seems that only after defendants took a cross-appeal challenging the award of interest on plaintiff's claim did plaintiff, as an afterthought, seek to enlarge her recoverable interest. As appellee with respect to the cross-appeal, she may not do so." (481 F. 2d, at p. 206.)

The scope of the appeal by Oetker before this Court, therefore, cannot go beyond the judgment entered in plaintiff's favor. Similarly, the scope of Standard's appeal includes plaintiff's judgment and the judgment for $37,500. by Oetker against Standard. All other claims, however, must remain undisturbed, including dismissal of the cross-claim by Standard against Bay Ridge or any purported expansion of the lower court's determination of Bay Ridge's liability either to Oetker or to Standard.

In line with these restrictions, Oetker does not seek on appeal any more than the lower court granted against Bay Ridge. While Standard seeks to be absolved from all liability to Oetker, it does not seek to accomplish this on appeal by transposing onto Bay Ridge any part of the judgment which Oetker obtained against Standard.

Presumably, therefore, both Oetker and Standard have recognized the scope of their appeals as not including those portions of the judgment below which pertained to recovery against Bay Ridge. Irrespective of their intent, however, inasmuch as their appeals did not include any portion of the judgment as to Bay Ridge, this Court should leave those portions undisturbed.

POINT II.

In any event, the judgment below was correct in directing recovery over by Oetker against Standard and Bay Ridge, each for one-half the damages.

Standard acknowledges that "The only basis for judgment over against Standard is to be found in *Cooper* v. *Kopke*," 417 U.S. 106 (1974). (Standard's brief at p. 17.) It argues, however, that the lower court "made unsupportable findings of fact" (Standard's brief at p. 24), in effect contending that its findings were clearly erroneous.

The specific findings which Standard claims are not supported by any evidence are, to the contrary, amply supported in the record.

1. *The finding that Standard knew or should have known that Zula boxes were stored in the lower hold.*

Nicotra, the terminal superintendent for Standard (136a) testified the cargo of bananas being discharged belong to Standard and were being shipped in boxes by Standard aboard the vessel from Honduras to New York (141a). These included the now taller Zula boxes, as well as the regular smaller size boxes (141a).

There was conflicting testimony as to the height of these boxes, but the lower court found that the new Zula boxes were about 4 inches higher than the regular boxes (238a). This is supported by plaintiff's testimony giving the height of the regular boxes as 9½ and the Zula as 11½ to 12 inches (40a).

About one month before the accident (137a, 139a, 146a), conveyor machines were furnished by Standard to Bay

Ridge for the specific purpose of unloading Standard's cargo. Nicotra admitted that while Bay Ridge is the stevedore unloading the bananas, Standard still retains an interest in productivity (138a) which he described as trying "to maintain a certain pace" by getting the bananas off as best and as fast as they can. He acknowledged that the quicker the bananas got off, the more money Standard made and that is the pace they try to maintain" (148a)

In these circumstances, Standard's knowledge that taller Zula boxes had been stored aboard the vessel in the lower hold seems indisputable. Standard owned the cargo, Standard decided on what height boxes to use, and Standard selected the newer taller boxes for the bananas it wanted carried aboard the vessel in question, and Standard, while it did not physically discharge the cargo, provided the equipment used in the discharge and at all times maintained an interest to see that the cargo was discharged at a quick pace.

2. *The side rails were inadequate to contain taller boxes.*

Despite Standard's statement that this Finding is not supported by the record, what it apparently means is there was conflicting testimony on the issue. The lower court as trier of the Facts, and who has the opportunity to observe the witnesses and evaluate their credibility, however, believed the testimony of plaintiff that the Zula boxes were much higher than the side rails of the conveyors which Standard had provided and that this could cause the Zula box to fall off (66a).

Standard argues that the mere fact one box fell is not a reasonable basis to infer that it fell because of the short rails. But plaintiff Castellano's testimony, while it may

have been confusing in some parts, did include a categorical statement that he saw other boxes falling from the conveyor belt at the same time the box which fell struck him (57a). This was supported by witness Salvatore who testified that during the day he saw boxes of bananas fall from the belts "many times" (86a), by witness Jackson who acknowledged that before the box at issue fell "other boxes had fallen down" and this happened "on the same day" (118a).

Standard's argument that the longshoreman improperly made equipment changes, and that there was nothing wrong with the conveyor belt which was improperly used, would perhaps be acceptable argument to convince the trier of the facts to make that finding. But the lower court rejected this argument, and specifically found that the side rails of conveyor belts were inadequate and that Standard had provided these inadequate conveyors for the discharge of its cargo in new and higher Zula boxes.

3. *That Standard furnished the conveyors to the defendant.*

Standard misinterprets the lower court's finding Standard's contract was directly with Bay Ridge, but Standard knew that Bay Ridge would use Standard's conveyors as stevedore equipment aboard the vessel. Standard, therefore, if it supplied unseaworthy equipment aboard the vessel and exposed the shipowner to liability would, in turn, be liable directly to the vessel. The conveyors were, therefore, furnished by Standard not only to Bay Ridge, but also to the vessel.

This is a typical case where contribution is authorized by the maritime law. The shipowner obtained partial indemnity or contribution from Standard, who did not employ plaintiff and, hence, had no immunity from the compensation laws.

In *Hurdich* v. *Eastmount Shipping Corp.*, 503 F. 2d 397, 503 F. 2d 397 (2nd Cir. 1974), the Second Circuit read *Cooper Stevedoring* as permitting contribution between joint tort feasors in non-collision cases provided that neither of the joint tort feasors is immunized from a suit which the injured victim of the tort could institute. The court denied indemnity to the shipowner but permitted contribution between the shipowner and independent contractor hired to install a new radio mast, when both were found negligent to plaintiff seaman.

In a very similar situation, where the court granted the shipowner full indemnity, it required both stevedores who breached their implied *Ryan** warranty of workmanlike performance, to share the damages 50-50 by granting the shipowner indemnity against each for one-half his damages. *D/S OVE SKOU* v. *Herbert*, 365 F.2d 341 (5th Cir. 1966), cert. den. 400 U.S. 902.

Having obained $37,500. contribution from a joint tort feasor, Oetker's damages recoverable in full indemnity from Bay Ridge for breach of its *Ryan* warranty could not have exceeded the unrecovered difference of $37,500. This was the amount taxed against Bay Ridge.

Moreover, even in cases of *Ryan* indemnity (as distinguished from contribution) by a shipowner against two separate stevedores, judgment that the damages be borne by them 50/50 has been authorized. *D/S OVE SKOU* v. *Herbert, supra.*

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* *Ryan* v. *Pan Atlantic S.S. Co.*, 350 U.S. 124.

CONCLUSION

If the court dismisses the complaint, the question of contribution between joint tort feasors may become moot.

Should this court sustain the jury verdict in plaintiff's favor, however, it should affirm that Standard and Oetker are joint tort feasors and contribution in favor of the shipowner against the non-employer stevedore was proper. In any event, as to Bay Ridge's liability, no appeal was taken by either Standard or Oetker and that portion of the judgment below dismissing the cross-claim of Standard and awarding Oetker $37,500. plus a portion of its attorneys' fees and costs should remain undisturbed.

Dated: New York, New York
May 24, 1976

Respectfully Submitted,

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-AND-

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Docket Numbers
75-7339
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CERTIFICATE
of
SERVICE

WE HEREBY CERTIFY that two (2) copies of the within Brief were this day mailed to the following:

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